

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 258

POWER MANUFACTURING COMPANY, PLAINTIFF
IN ERROR,

vs.

HARVEY SAUNDERS

IN ERROR TO THE SUPREME COURT OF THE STATE OF
ARKANSAS

FILED NOVEMBER 12, 1926

(31,574)

(31,574)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 851

POWER MANUFACTURING COMPANY, PLAINTIFF
IN ERROR,

vs.

HARVEY SAUNDERS

IN ERROR TO THE SUPREME COURT OF THE STATE OF
ARKANSAS

INDEX

	Original	Print
Proceedings in supreme court of Arkansas.....	2	1
Stipulation re transcript of record.....	1	1
Record from circuit court of Saline County.....	2	2
Caption.....(omitted in printing)...	2	
Bill of complaint.....	3	2
Summons and sheriff's return.....(omitted in printing)...	6	
Motion to dismiss.....	7	4
Amendment to motion to dismiss.....	11	6
Answer.....	14	7
Order setting cause for hearing.....	18	9
Judgment.....	19	10
Caption.....(omitted in printing)...	22	
Judgment.....	22	11
Opinion, Smith, J.....	23	11
Clerk's certificate.....(omitted in printing)...	22	
Assignment of errors.....	33	17
Petition for writ of error and order allowing same.....	35	18
Bond on writ of error.....(omitted in printing)...	36	
Writ of error.....	37	20
Certificate of lodgment.....(omitted in printing)...	39	
Citation and service.....(" " ")...	40	
Return to writ of error.....(" " ")...	41	
Statement of points to be relied upon and designation of parts of record to be printed.....	42	21



[fol. 1] **IN SUPREME COURT OF ARKANSAS**

No. 8813

POWER MANUFACTURING COMPANY, Appellant,

vs.

HARVEY SAUNDERS, Appellee

STIPULATION RE TRANSCRIPT OF RECORD

It is stipulated and agreed by the parties hereto that the Clerk of the Supreme Court of Arkansas, in making the transcript of record for the writ of error in above case, shall include the following:

1. Complaint.
2. Summons.
3. Motion to dismiss.
4. Amendment to motion to dismiss.
5. Answer.
6. Order of Saline Circuit Court overruling motion to dismiss.
7. Judgment of Saline Circuit Court.
8. Opinion of Supreme Court of Arkansas.
9. Judgment of Supreme Court of Arkansas.
10. Petition for writ of error.
11. Assignment of errors.
12. Writ of error.
13. Citation.
14. Bond.

Geo. C. Lewis, Buzbee, Pugh & Harrison, Attorneys
for Appellant, Power Manufacturing Company.
William R. Donham, Attorneys for Appellee, Har-
vey Saunders.

[fol. 2] [Caption omitted]

[fol. 3] IN CIRCUIT COURT OF SALINE COUNTY

HARVEY SAUNDERS, Plaintiff,

vs.

THE POWER MANUFACTURING COMPANY, Defendant

BILL OF COMPLAINT—Filed August 2, 1923

The plaintiff, Harvey Saunders, for his cause of action against the defendant, Power Manufacturing Company, states:

That he is a resident and citizen of the City of Cincinnati, State of Ohio; that defendant is a corporation organized under the laws of the State of Ohio, with its principal place of business at Marion, Ohio, and is a corporate citizen and resident of said State of Ohio.

That on the 27th day of March, 1922, he was employed by the defendant at Stuttgart, Arkansas, and on said date was engaged with two employees in rolling a heavy wheel, weight about 4,000 pounds, and about six feet in diameter, on the floor of defendant's warehouse, for the purpose of removing it from said house, and loading it into a railroad car to be shipped to a party who had purchased it; that while so engaged he was severely injured.

That while employed as hereinabove alleged it was the duty of the defendant company to use reasonable care to furnish him a reasonably safe place in which to work, and it was the duty of the employees assisting him to exercise [fol. 4] reasonable care in the performance of their duties. That while he and said other employees were rolling said wheel along the floor of said defendant's warehouse it became overbalanced and fell; that when he saw that it was going to fall he attempted to get out of the way so that it would not fall upon him; that he would have succeeded in extricating himself from his dangerous situation except for the fact that the heel of his shoe caught between two of the floor planks and he was thus held while the rim of said wheel came down upon his right leg; breaking same about three inches above the ankle, resulting in a compound fracture of the bones of the leg; that his said leg was broken

just below the knee joint, the head of the large bone known as the tibia being broken off; that on the next day after his injury he was brought to a hospital in the City of Little Rock, where he remained for a period of nineteen weeks. His entire leg became infected and was lanced in eleven different places; that because of his injuries he was placed under the influence of an anesthetic on three different occasions for the purpose of setting the broken bones and in order that he might receive proper treatment for his injured limb; that his injuries are permanent and such as to render him a cripple, the joints of the limb at the knee and ankle being left in an ankylosed condition; that because of his injuries he was made to suffer great pain, both of body and mind and will continue to suffer as long as he shall live.

That his injuries were due to the joint negligence and [fol. 5] carelessness of the employees assisting him, in not taking proper care to prevent said wheel becoming overbalanced and falling, and the defendant company in failing to exercise reasonable care to provide him a reasonably safe place in which to work, in that the floor of said warehouse was so constructed, by reason of the space left between the floor planks, as to make it exceedingly dangerous.

That prior to his injuries he was receiving the sum of \$175.00 per month as his wages; that because of his injuries he will never again be able to do so much work as he was accustomed to doing before his injuries; that because of his injuries he has been damaged in the sum of \$35,000.

Wherefore, he prays judgment against the defendant in the sum of \$35,000 damages, for costs and all other proper relief.

Mehaffy, Donham, & Mehaffy, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 6] Summons and sheriff's return, filed August 11, 1923, omitted in printing.

[fol. 7] IN CIRCUIT COURT OF SALINE COUNTY

[Title omitted]

MOTION TO DISMISS—Filed September 3, 1924

Comes the defendant and moves the Court to quash the service of summons and to dismiss the complaint filed herein, for want of jurisdiction and for cause says:

I

The plaintiff at the time of the accident complained of was a resident and citizen of Arkansas County, and still maintains a residence in said county, and all of the matters and things complained of in said complaint occurred in said county.

The defendant is a corporation organized and existing under the laws of the State of Ohio, and is doing business as a foreign corporation in Arkansas; that its business in Arkansas is located and conducted in Arkansas County, and it does not maintain or conduct an office or business in any other County in this State.

The plaintiff seeks to maintain this suit against the defendant in this county under and by virtue of the pretended authority of Section 1829, Crawford & Moses' Digest of the Statutes of Arkansas.

[fol. 8] That said section is null and void as applied to this defendant, for the following reasons:

The said section does not apply to corporations of this State and under the statutes and laws, corporations of this State cannot be sued except in Counties where their principal office is located or in which they do business. That this defendant has no office or place of business nearer to Saline County than Arkansas County, and if plaintiff is allowed to maintain this suit in this County, defendant will be denied a fair and impartial trial, because the defendant witnesses are not within jurisdiction of this Court and cannot be required to attend the trial and defendant will be deprived of the benefit of their presence at the trial, unless it be able to make arrangements for their attendance at court, at great and unnecessary expense.

That such attempt of said Section 1829, Crawford &

Moses' Digest to confer jurisdiction of this case upon this Court while such jurisdiction is not conferred in the cases of corporations of this State doing business in Arkansas and other counties of the State is a discrimination against the defendant, and in violation of that part of Article twelve, Section Eleven of the Constitution of Arkansas, which provides that foreign corporations as to contracts made or business done in this State shall be subject to the same regulations, limitations, and liabilities as like corporations in this State.

[fol. 9]

II

That by said Article Twelve, Section Eleven of the Constitution of Arkansas, the State of Arkansas guaranteed to this defendant, when it entered the State of Arkansas for the purpose of doing business therein, that, as to contracts made, or business done in this State, it should be subject to the same regulations, limitations and liabilities as like corporations of this State. That relying upon said constitutional guarantee the defendant entered this State and made large investments for the purpose of carrying on its business, and that the attempted enforcement against this defendant of the provisions of Section 1829 of Crawford & Moses' Digest, while same are not enforced against like corporations of this State, is an impairment of the obligations of the contract created by the Constitution of Arkansas, and in violation of Section Ten, Article One, and Section One of the Fourteenth Amendment of the Constitution of the United States.

Wherefore defendant prays that the complaint herein be dismissed.

Geo. C. Lewis, Buzbee, Pugh & Harrison, Attorneys
for Defendant.

[fol. 10] *Duly sworn to by H. T. Harrison. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 11] IN CIRCUIT COURT OF SALINE COUNTY

[Title omitted]

AMENDMENT TO MOTION TO DISMISS—Filed March 3, 1924

Comes the Power Manufacturing Company, and as an amendment to its motion to dismiss previously filed herein, reaffirms all the allegations and statements contained in said motion, and states further:

That the defendant is a foreign corporation, created by and existing under the laws of the State of Ohio; that it has been duly licensed to do business in the State of Arkansas, having fully complied with all the laws of the said State; that it designated in its application for said license and authority to do business in the State, its general office or place of business in the State of Arkansas, as Stuttgart, in the county of Arkansas, State of Arkansas, and named as its agent upon whom process may be served George C. Lewis, and designated his place of residence in Stuttgart, County of Arkansas, in the State of Arkansas; and that the cause of action sued on herein arose in said City of Stuttgart, County of Arkansas; that it does not keep or maintain in the County of Saline a branch office or other place of business; nor is there any property of or debts owing to it in the said County of Saline; nor is it engaged in the business of banking or insurance, nor does [fol. 12] its chief officer reside in said County of Saline.

That as shown by the summons it was directed to the sheriff of Arkansas County, State of Arkansas, and his return thereon shows that it was served by said Sheriff on the designated agent of the defendant in said County of Arkansas, and that no service was had on this defendant in the said county of Saline.

And this defendant claims and charges that Section 1829 of Crawford & Moses' Digest of Arkansas statutes, authorizing foreign corporations to be sued in any county in the State regardless of the county in which such foreign corporation may be served, while domestic corporations can only be sued in the county where their principal office is, is in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, pro-

libiting a State from depriving any person within the State or his or its property without due process of law or denying to any person within its jurisdiction the equal privilege of the laws.

Wherefore, defendant prays as in its original motion, that the service of process on it herein be quashed and set aside and that plaintiff's suit be dismissed.

Geo. C. Lewis, Buzbee, Pugh & Harrison, Attorneys
for Defendant.

[fol. 13] *Duly sworn to by H. T. Harrison. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 14] IN CIRCUIT COURT OF SALINE COUNTY

[Title omitted]

ANSWER—Filed March 3, 1924

Comes the defendant, The Power Manufacturing Company, and, without waiving its motion to dismiss previously filed herein, but expressly reserving its objections and exceptions to the action of the Court in overruling said motion and in assuming jurisdiction of this cause, for its answer to plaintiff's complaint, states:

It does not know and therefore denies that plaintiff is a resident and citizen of Ohio.

It is true that the plaintiff was employed by the defendant at Stuttgart, Arkansas, the 27th day of March, 1922, and that on said date he was engaged, with two other persons, in loading an iron wheel from defendant's warehouse into a railroad car to be shipped to a person who had purchased it, but it does not know and therefore denies that the two persons who were engaged with the plaintiff at the time were employees of the defendant.

Defendant states that it does not know and therefore denies that while the plaintiff and any other employees of the defendant were rolling said wheel along the floor of the

defendant's warehouse it became overbalanced and fell, or that the plaintiff attempted to get out of the way of said [fol. 15] wheel, or denies that he was delayed in extricating himself from a dangerous situation by reason of the heel of his shoe getting caught between two of the floor planks, or that he was thus held while the rim of said wheel came down upon his right leg. Denies that the heel of his shoe caught between two of the floor planks.

Defendant denies that the plaintiff suffered a compound fracture to the bones of the leg, or that his leg was broken about three inches above the ankle or just below the knee joint, or that the head of the tibia was broken off. Denies that his leg became infected or that it was lanced in eleven different places, or that on account of his injuries he was placed under an anesthetic on three different occasions for purposes of treatment. Denies that plaintiff's injuries are permanent or such as to render him a cripple. Denies that the joints of the limb at the knee and the ankle are in ankylosed condition. Denies that he was made to suffer great pain of body and mind on account of his injuries or that he will continue to suffer in the future.

Defendant states that it is not true that the plaintiff's injuries were due to the joint negligence and carelessness of the persons assisting him in not taking proper care to prevent said wheel becoming overbalanced and falling and of the defendant failing to exercise due care to provide the plaintiff a reasonable safe place in which to work. Denies that the floor of the warehouse was so constructed as to make it dangerous or that space was left between the [fol. 16] floor planks that this condition was not such as to render the floor unsafe for the uses to which it was to be put. Defendant denies that the persons working with the plaintiff at the time of the injury complained of failing to exercise due care to prevent said wheel becoming overbalanced and falling but avers that said persons in the discharge of their duties exercised due care to prevent the accident and the floor, where the plaintiff was working at the time, was reasonably safe for the uses to which it was to be put.

Defendant further states that the plaintiff was in charge of the loading operations described in his complaint and the men who were assisting were working under his con-

trol and direction and the conditions of the place where he was working, were open and obvious and were well known to him, and whatever injuries he may have suffered at the time and place complained of were due to his own negligence or to a risk assumed by him.

Defendant denies that because of the injuries complained of plaintiff's ability to work or his earning capacity has been diminished to any extent whatever, or that he has been damaged in the sum of \$35,000.00, or any other amount.

For a further and complete defense to plaintiff's suit herein, the defendant states that on or about the 15th day of April, 1922, more than two weeks after the injuries complained of, the defendant, at the request of the plaintiff, effected an agreement of settlement with the plaintiff under the terms of which settlement the plaintiff, for a value [fol. 17] able consideration, paid by the defendant released and discharged the defendant of and from any and all claims and demands of every nature whatever growing out of the accident and injuries described in plaintiff's complaint, which settlement the defendant pleads as a bar to this suit.

Wherefore, having fully answered, defendants prays that plaintiff's suit be dismissed, and it be hence discharged with all its costs, and this be expended.

Geo. C. Lewis, Buzbee, Pugh & Harrison, Attorneys
for Defendant.

[File endorsement omitted.]

[fol. 18] IN CIRCUIT COURT OF SALINE COUNTY

[Title omitted]

ORDER SETTING CAUSE FOR HEARING—March 3, 1924

This cause coming on to be heard upon the complaint of the plaintiff and the summons and the Sheriff's return thereon and the defendant's motion to dismiss and amendment to said motion and a certified copy of the mandate of the United States District Court for the Eastern District of Arkansas, Western Division, remanding this cause to

the State court for trial, and the Court being well and sufficiently advised in the premises, doth overrule the defendant's motion to dismiss and the amendment to the motion to dismiss to which action of the Court the defendant at the time duly excepted and had its exceptions noted of record.

Therefore, the defendant within the time allowed by the Court filed its answer in this cause, and by order of the Court this cause is set specially for trial on Monday, March 17th, 1924.

[fol. 19] IN CIRCUIT COURT OF SALINE COUNTY

[Title omitted]

JUDGMENT—March 17, 1924

On this day this cause coming on to be heard and comes the plaintiff, Harvey Saunders in person and by his Attorneys, Mehaffy, Donham & Mehaffy, Esqrs., and comes also the defendant, The Power Manufacturing Company, by its Attorneys, H. T. Harrison, Esqr., and Ernest Briner, Esqr., and both parties announce ready for trial.

Whereupon a jury is ordered and comes all the members of the regular panel of the Petit Jury who were duly sworn and tried as to their qualifications and found competent and the following named jurors were selected and duly sworn to try this case, to-wit: J. B. Suddeth, T. R. Warnock, W. A. Beckwith, J. L. Smith, Lee Cate, Roscoe Young, J. D. Little, J. W. Northern, B. A. Gregory, A. L. Stirman, W. A. Russell and Wm. Richey, who were accepted by both parties and were duly sworn and empaneled as a trial jury in this case and after hearing the evidence adduced, the argument of counsel, and receiving the instructions of the Court retired to consider of their verdict and afterwards on the same day returned into open court the following verdict, to-wit: "We the jury find for the plaintiff in the sum of \$7,500.00. J. B. Suddeth, Foreman." [fols. 20 & 21] It is therefore considered, ordered and adjudged by the Court that the plaintiff do have and recover of and from the defendant, The Power Manufacturing Company, judgment in the sum of Seven Thousand

and Five Hundred and no/100 (\$7,500.00) Dollars and all costs accrued in this case for which execution may issue.

[fol. 22] IN SUPREME COURT OF ARKANSAS

[Caption omitted]

[Title omitted]

JUDGMENT—November 2, 1925

This cause came on to be heard upon the transcript of the record of the circuit court of Saline county, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be and the same is hereby in all things affirmed with costs, and that said appellee recover of said appellant and Fidelity and Deposit Company of Maryland, surety in the supersedeas bond filed in this cause, the sum Seven Thousand and Five Hundred Dollars, with interest at six per cent per annum from the 17th day of March, A. D. 1924, the amount of judgment of said circuit court.

It is further considered that said appellee recover of said appellant and said surety all his costs in this Court and the court below in this cause expended, and have execution thereof.

[fol. 23] IN SUPREME COURT OF ARKANSAS

[Title omitted]

OPINION—November 2, 1925

SMITH, J.:

Appellee, who was the plaintiff below, was, at the time of the institution of this suit, a resident and citizen of Cincinnati, Ohio, and appellant, the defendant below, is a corporation organized under the laws of that state and having its principal place of business in Marion, Ohio.

Appellant has been duly authorized to do business in this State, and operates, at Stuttgart, in Arkansas county, Arkansas, a warehouse, from which it delivers machinery to the purchasers thereof. On March 27th, 1922, plaintiff was employed by the defendant at its warehouse in Stuttgart, in conjunction with two other employees of defendant, in rolling a heavy fly-wheel, weighing about four thousand pounds and about six feet in diameter, on the floor of the warehouse for the purpose of loading the wheel into a railroad car, to be shipped to a party who had purchased the wheel, and while so engaged the wheel became over-balanced and fell on plaintiff and inflicted a very serious injury. This suit was brought to recover damages to compensate this injury.

Defendant moved the court to quash the service of summons and to dismiss the complaint for the want of jurisdiction for the reason that the plaintiff, at the time of the [fol. 24] accident, was a resident and citizen of Arkansas county, where the injury occurred, and where the defendant conducted its business in this State. Defendant did not maintain an office or conduct business in any other county in this State. The suit was brought in Saline county, Arkansas, and it was alleged, in the motion to dismiss, that neither of the parties to this suit, nor any of the witnesses in the case, resided in Saline county, and that it would involve the expenditure of a large sum of money for the defendant to arrange for the attendance of its witnesses in that county. It was, therefore, alleged, in the motion to dismiss, that it would be a discrimination against the defendant to require it to defend the suit in Saline county, and that Section 1829 C. & M. Digest of the statutes of the State, which permitted the suit to be brought in any county in the State, violated that part of Article 12, Section 11, of the Constitution of the State, which provides that foreign corporations shall be subject, as to contracts made or business done in this State, to the same regulations, limitations, and liabilities as like corporations of this State, and that said section of the statutes of the State impaired the obligation of the contract created by the Constitution of the state and is, therefore, void under Section 10, Article 1, of the Federal Constitution, and it was further insisted that the statute is in violation of the provisions of the Fourteenth Amendment to the Constitution of the United

States, prohibiting a State from depriving any person within the State of his or its property without due process [fol. 25] of law, or denying to any person within its jurisdiction the equal protection of the law.

The motion to quash the summons and to dismiss the action for want of jurisdiction was overruled, and this ruling of the court is assigned as error.

Appellant concedes that the motion to dismiss was properly overruled if Section 1829 C. & M. Digest is valid and constitutional, but, as was set forth in the motion, the constitutionality of that statute is challenged as violative of both the State and Federal Constitutions. The section of the statute in question reads as follows: "Sec. 1829. Service of summons and other process upon the agent designated under the provisions of Section 1826 at any place in this State shall be sufficient service to give jurisdiction over such foreign corporation of any of the courts of this State, whether the service was had upon said agent within the county where the suit is brought or is pending or not."

The question presented is an interesting one, but was decided adversely to appellant's contention in the case of *Pekin Cooperage Co. v. Duty*, 140 Ark. 135. The points here raised were there presented, and we there said that the statute provided a method of procedure whereby foreign corporations which had complied with the law of the State authorizing them to do business in the State might be sued, and that a local or county residence had not been given such corporations, and that the statute did not impair any constitutional rights of foreign corporations or discriminate [fol. 26] against them, but had only provided the forum in which they might be sued, as they had been given no local residence in the State.

It is earnestly insisted, however, that this case should be reconsidered and overruled, in view of the decision of the Supreme Court of the United States in the case of *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 262 U. S. 544.

In that case there was involved the validity of a statute of the State of Wisconsin, which provided that a foreign corporation not domesticated or doing business in that State or having property there other than that sought to be recovered in the particular action, may be compelled, as a condition to the maintenance of its action, to send an officer

of the corporation, with its books and papers bearing on the matter in controversy, from its domicile to the State of Wisconsin, where the action was brought, in order to submit to an adversary examination before the party sued should be required to answer. The statute did not subject non-resident individuals to such examination except when served with notice within the State, and then only in the county where service was had, and limited the examination, in the case of residents of the State, individual or corporate, to the county of their residence.

The statute was upheld by the Supreme Court of Wisconsin (171 Wis. 586) on the ground that it amounted to no more than a reasonable exercise of the authority of the [fol. 27] State over a nonresident corporation coming voluntarily into the State to seek a remedy in the courts of that State against a resident defendant.

The case was appealed to the Supreme Court of the United States, where the view of the Supreme Court of the State of Wisconsin was disapproved, and Mr. Justice Van Devanter, speaking for the Supreme Court of the United States, said the statute violated the equal protection clause of the Federal Constitution by imposing a rule more onerous on foreign corporations than was applicable to nonresident individuals in like situation, and was also more onerous than that applicable to resident suitors, whether individuals or corporations.

Our statute, under our interpretation of it in the cases herein cited, is not one imposing burdens as a condition precedent upon which foreign corporations may have access to the courts of the State, but is one procedure, prescribing the venue where actions may be brought against foreign corporations by anyone, resident or nonresident.

We adhere, therefore, to our former interpretation of the statute and approve the action of the trial court in overruling the motion to dismiss. *American Hardwood Lbr. Co. v. Ellis & Co.* 115 Ark. 524; *Pekin Cooperage Co. v. Duty*, supra; *Missouri State Life Ins. Co. v. Witt*, 165 Ark. 604.

It is next insisted that the court erred in submitting to the jury the question of the defective condition of the floor of the warehouse on which the wheel was being rolled as [fol. 28] conconstituting actionable negligence. The testi-

mony shows that the floor of the platform was constructed of two-inch planks, laid with open cracks, and that as the wheel was being loaded into a car it became overbalanced and started to fall, and as plaintiff attempted to get out of the way the heel of his shoe caught in one of the cracks, which was about three inches wide, and while he was thus entrapped the wheel fell over on him.

It is insisted that the alleged defect was structural in its nature, and that the plaintiff had been employed by defendant for about eleven months and should have been charged, as a matter of law, with the assumption of the risk of an injury from a danger so obvious. It is true that plaintiff had been employed by the defendant for about eleven months, but it is also true that he had been employed as a field man or "trouble shooter" in the rice fields, where the machinery sold by defendant was installed, and it was the business of plaintiff to install the machinery and to report and remedy any defects which developed in the machinery so installed, and plaintiff testified that he had never before assisted in loading a wheel or other machinery from the warehouse into a car.

We are unwilling to say, as a matter of law, that plaintiff assumed the risk of injury from the defective condition of the platform. Moreover, the defendant requested instructions submitting this issue to the jury, and it cannot, therefore, complain that this was done.

The case was submitted to the jury also on the question [fol. 29] of the negligence of appellee's fellow-servants. The instructions on this issue are not questioned as correct declarations of law, but it is insisted that the testimony did not warrant the submission of the issue to the jury. The testimony of appellee touching the cause of his injury was to the following effect. He and two other employees had loaded the base of the engine and the boxed parts thereof into a car, and were proceeding to load the fly-wheel. In rolling the fly-wheel from the platform, which joins the warehouse, they had it on a plank laid crosswise on the floor, and the plank rested on the top of the car floor, and in order to get down to the level of the car floor, so as not to have a drop, plaintiff laid another plank by the side of the one extending into the car. They had turned the wheel crosswise to roll it on to the second plank. Plaintiff was on the side next to the warehouse,

and the other two men were on the opposite side of the wheel, and in rolling it these two men pushed the wheel beyond the balancing point, and when they did so they released their hold on the wheel and yelled to plaintiff to get out of the way. Plaintiff attempted to hold the wheel until he could get out of the way, and while endeavoring so to do so his heel caught in one of the cracks in the floor of the platform. Plaintiff alone could not restore the wheel to a balance and it fell over on his leg and crushed it.

The case is not unlike the recent case of *Texas Pipe Line Co. v. Johnson, Ms. Op.*, and is controlled by the principles [fol. 30] there announced. In that case an employee, in conjunction with four other employees, was engaged in laying a pipe line for running oil into a main pipe line. The pipe was being carried with carrying-irons, and one of the employees released his hold on the carrying-iron, thus throwing, unexpectedly, the weight of the pipe on the plaintiff in that case. We said the jury was warranted in finding that this action of the fellow-servant was negligence. So, here, we think the jury was warranted in finding that the action of plaintiff's fellow-servants in so pushing on the wheel as to overturn it was negligence.

It is finally insisted that the jury should have been instructed to return a verdict for the defendant upon the ground that, for a valuable consideration, plaintiff had released defendant from further liability. Appellee responds to this insistence by saying, first, that the release should be so construed as applying only to certain specific items of damage therein referred to. Appellee further insists that the testimony warranted the jury in finding that at the time the release was signed he was incapacitated to contract because of his suffering from his injury. This question was submitted to the jury under correct instructions, and the finding of the jury is conclusive of this issue of fact. We do not, therefore, review the language of the release itself.

Appellee testified that he had discussed with appellant's adjuster only the payment of hospital bills and doctor's fees and certain other items. That while he glanced over [fol. 31] the release before signing it he did not understand that it attempted to release his claim for damages. That he had not slept for nineteen days except a few minutes

at a time, and then only when under the influence of an opiate, and at the time he signed the writing there were eleven drainage tubes in his leg and he had a temperature running as high as 103.

Under those circumstances it was a question for the jury to determine whether plaintiff had the capacity to make a binding contract of release. *St. L. I. M. & S. Ry. Co. v. Brown*, 73 Ark. 42; *Bearden v. St. L. I. M. & S. Ry. Co.* 103 Ark. 341; *St. L. I. M. & S. Ry. Co. v. Reilly*, 110 Ark. 182; *Harris Lbr. Co. v. Morris*, 80 Ark. 260; *Truman Cooperage Co. v. Crye*, 137 Ark. 293; *St. L. I. M. & S. Ry. Co. v. Sandidge*, 81 Ark. 264; *Poinsett Lbr. & Mfg. Co. v. Longino*, 139 Ark. 69.

What we have said disposes of appellant's contention that a verdict should have been directed in its favor under the undisputed evidence.

It is not insisted that the verdict is excessive, and as we find no prejudicial error in the judgment it is affirmed.

[fol. 32] Clerk's certificate to foregoing papers omitted in printing.

[fol. 33] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed December 11, 1925

Now comes appellant, Power Manufacturing Company, and files herewith its petition for a writ of error, and says there are errors in the record and proceedings in the above entitled cause, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

1. The Supreme Court of Arkansas erred in holding and deciding that Section 1829 of Crawford and Moses' Digest of the Statutes of Arkansas was valid. The validity of said Section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of Section 10, Article 1 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

2. The Supreme Court of Arkansas erred in holding and deciding that Section 1829 of Crawford and Moses' Digest of the Statutes of Arkansas was valid. The validity of said Section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of Section 1 of the 14th Amendment to the Constitution of the United States, which provides that no State shall "deny to any person within [fol. 34] its jurisdiction the equal protection of the laws."

3. The Supreme Court of Arkansas erred in holding and deciding that Section 1829 of Crawford and Moses' Digest of the Statutes of Arkansas was valid. The validity of said Section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of Section 1 of the 14th Amendment to the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property, without due process of law."

4. The Supreme Court of Arkansas erred in affirming the action of the trial Court in rendering a judgment against the appellant, Power Manufacturing Company.

For which errors the appellant, Power Manufacturing Company, prays that the judgment of the Supreme Court of the State of Arkansas, dated November 2nd, 1925, be reversed, and a judgment rendered in favor of the Appellant Company, and for costs.

Geo. C. Lewis, Buzbee, Pugh & Harrison, Attorneys
for Appellant, Power Manufacturing Company.

[File endorsement omitted.]

[fol. 35] IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—
Filed December 11, 1925

Considering itself aggrieved by the final decision of the Supreme Court of Arkansas in rendering judgment against it in the above entitled case, the appellant hereby prays a

writ of error from said decision and judgment to the Supreme Court of the United States, and an order fixing the amount of a supersedeas bond

Assignment of errors herewith.

Geo. C. Lewis, Buzbee, Pugh & Harrison, Attorneys
for Appellant, Power Manufacturing Company.

STATE OF ARKANSAS, ss:

SUPREME COURT

Let the writ of error issue upon the execution of a bond by Power Manufacturing Company to Harvey Saunders, in the sum of Ten thousand Dollars (\$10,000.00), such bond when approved to act as a supersedeas.

Dated December 11, 1925.

E. A. McCulloch, Chief Justice Supreme Court of
Arkansas.

[File endorsement omitted.]

[fol. 36] Bond on writ of error for \$10,000, approved and filed December 11, 1925, omitted in printing.

[fol. 37] IN SUPREME COURT OF ARKANSAS

WRIT OF ERROR—Filed December 11, 1925

The President of the United States of America to the
Honorable the Judges of the Supreme Court of the State
of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Harvey Saunders and Power Manufacturing Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the de-

cision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Power Manufacturing Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the [fol. 38] laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 11th day of Dec., in the year of our Lord one thousand nine hundred twenty-five.

Sid B. Redding, Clerk District Court of the United States, Western Division, Eastern District of Arkansas, by H. P. Feild, D. C. (Seal of the District Court, Western Division, U. S. A.)

Allowed. E. A. McCulloch, Chief Justice Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 39] Certificate of lodgment omitted in printing.

[fol. 40] Citation in usual form, showing service on William R. Donham, filed December 11, 1925, omitted in printing.

[fol. 41] Return to writ of error omitted in printing.

[fol. 42] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
OF PARTS OF RECORD TO BE PRINTED—Filed December 19,
1925

Comes the appellant and plaintiff in error and states that the points on which it intends to rely in the consideration of the above cause are, as follows:

1. The Supreme Court of Arkansas erred in holding and deciding that Section 1829 of Crawford and Moses' Digest of the Statutes of Arkansas was valid. The validity of said Section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of Section 10, Article 1 of the Constitution of the United States, which provides that, no State shall pass any law impairing the obligation of contracts.

2. The Supreme Court of Arkansas erred in holding and deciding that Section 1829 of Crawford and Moses' Digest of the Statutes of Arkansas was valid. The validity of said Section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of Section 1 of the 14th Amendment to the Constitution of the United States, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

3. The Supreme Court of Arkansas erred in holding and deciding that Section 1829 of Crawford and Moses' Digest of the Statutes of Arkansas was valid. The validity of said Section was denied and drawn in question by the appellant, [fol. 43] Power Manufacturing Company, on the ground of its being repugnant to that part of Section 1 of the 14th

Amendment to the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property, without due process of law."

4. The Supreme Court of Arkansas erred in affirming the action of the trial Court in rendering a judgment against the appellant, Power Manufacturing Company.

That it is necessary for the consideration thereof that the entire record be printed.

Thos. S. Buzbee, Geo. B. Pugh, H. T. Harrison, Geo.
C. Lewis, Attorneys for Appellant and Plaintiff in
Error.

It is agreed by the parties hereto that the entire record in this case is necessary for the consideration of the points involved.

Thos. S. Buzbee, Geo. B. Pugh, H. T. Harrison, Geo.
C. Lewis, Attorneys for Appellant and Plaintiff in
Error. William R. Donham, Attorney for Ap-
pellee and Defendant in Error.

[fol. 44] [File endorsement omitted.]

Endorsed on cover: File No. 31,574. Arkansas Supreme Court. Term No. 851. Power Manufacturing Company, plaintiff in error, vs. Harvey Saunders. Filed December 19th, 1925. File No. 31,574.

STATE OF NEW YORK

IN SENATE

January 25, 1908

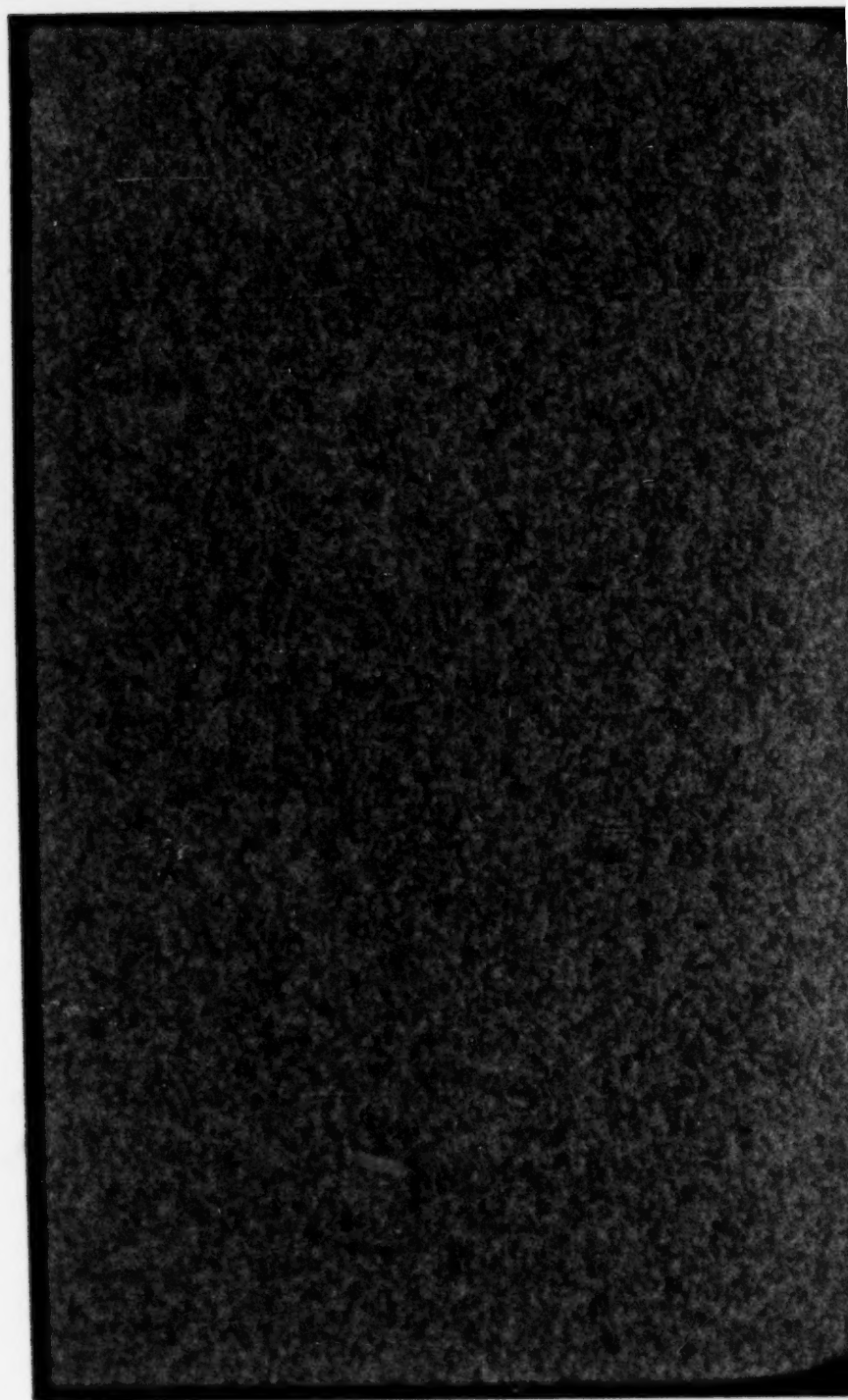
REPORT OF THE COMMISSIONER OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

IN SENATE TO THE SENATE COURSE OF THE
STATE OF NEW YORK

REPORT FOR THE YEAR 1907

ALBANY:
J. B. LIPPINCOTT
1908



INDEX.

	Page
Jurisdiction	3
Statement	4
Specifications of errors	8
Argument	9
The Arkansas statute is repugnant to that part of Section 10, Article 1, of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts	9
The Arkansas statute denies to plaintiff in error and others in like situation the equal protection of the laws	16
Appendix	29
Article XII, Section 11, Constitution of Arkansas,	29
Section 1152, Crawford & Moses' Digest	29
Section 1171, Crawford & Moses' Digest	30
Section 1176, Crawford & Moses' Digest	30
Section 1826, Crawford & Moses' Digest	30
Section 1827, Crawford & Moses' Digest	30
Section 1828, Crawford & Moses' Digest	31
Section 1829, Crawford & Moses' Digest	31
Section 4161, Crawford & Moses' Digest	31

TABLES OF CASES CITED.

American Hardwood Lumber Co. v. Ellis, 115 Ark. 524	13, 18, 25, 26
American Smelting Co. v. Colorado, 204 U. S. 103	11
Backus v. Fort Street Union Depot Co. 169 U. S. 557	18
Central Coal & Coke Co. v. Ocepek, 244 S. W. 337	15
Central Coal & Coke Co. v. Ocepek, 261 U. S. 605	15
Central Coal & Coke Co. v. Orwig, 150 Ark. 635	15
C., R. I. & P. Ry. Co. v. Ludwig, 156 Fed. 152	13

TABLE OF CASES CITED—Continued.

	Page
C., R. I. & P. Ry. Co. v. Swanger, 157 Fed. 783	14
Crawford & Moses' Digest Sec. 1152	4, 9
Crawford & Moses' Digest Sec. 1171	4, 9
Crawford & Moses' Digest Sec. 1176	4, 16
Crawford & Moses' Digest Sec. 1826	26
Crawford & Moses' Digest Sec. 1829	4, 8, 9, 11, 14, 19
Crawford & Moses' Digest Sec. 4161	10
Edwards v. Kearzey, 96 U. S. 595	12
Ex Parte Wisner, 203 U. S. 449	14
Frost & Frost Trucking Company v. Railroad Commission of Calif., Opinion 6-7-26, 271 U. S., 583	28
Grocers' Fruit Growing Union v. Kern County Land Co., 150 Calif. 466; 89 Pac. 120	24
Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 150	16
Hanover Fire Insurance Co. v. Carr, decided 11-23-26, 71 U. S. Supreme Court Law Ed. 224	28
Hendrickson v. Apperson, 245 U. S. 105-113	13
Jacks v. Central Coal & Coke Co., 156 Ark. 211	13
Kansas City Southern v. Albers Commission Co., 223 U. S. 573	15
Kentucky Company v. Paramount Exchange, 262 U. S. 544	19
Louisiana v. New Orleans, 102 U. S. 203	13
Lee v. Chesapeake & Ohio Ry. Co., 260 U. S. 653	15
Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 683	15
McClung v. Pulitzer Publishing Co., 279 Mo. 370; 214 S. W. 193	22
Missouri State Life Ins. Co. v. Witt, 165 Ark. 604	13
Pekin Cooperage Co. v. Duty, 140 Ark. 135	12, 13, 18, 26
Power Manufacturing Co. v. Saunders, 169 Ark. 748	7, 18
St. Louis & S. F. Railroad Co. v. Cross, 171 Fed. 480	14
Seaboard Air Line Ry. Co. v. Railroad Commission of Alabama, 155 Fed. 792	13
Terral v. Burke Construction Co., 257 U. S. 529	14, 27
Wisner, Ex Parte, 203 U. S. 449	14

IN THE
Supreme Court of the United States

OCTOBER TERM, 1925.

No. 851

POWER MANUFACTURING COMPANY *Plaintiff in Error,*

v.

HARVEY SAUNDERS *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE
STATE OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

JURISDICTION.

This writ of error was sued out to reverse a judgment of the Supreme Court of Arkansas, rendered November 2, 1925, (Tr. p. 11) and reported 169 Ark. 748. Plaintiff in error contended that section 1829 of Crawford & Moses' Digest of the Statutes of Arkansas, involved in said suit, was void because repugnant to that part of section 10, article 1, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, and that part of section 1 of the Fourteenth Amendment to the Constitution which provides that no State shall "deny to any person within its jurisdiction the

equal protection of the laws" nor "deprive any person of life, liberty or property without due process of law." The Supreme Court of Arkansas sustained the validity of said statute, and a writ of error to this court was obtained under the provisions of section 237 (a) of the Judicial Code.

STATEMENT.

Section 1829, Crawford & Moses' Digest of the Statutes of Arkansas, as construed by the Supreme Court of Arkansas, authorizes foreign corporations to be sued in any county in the State, regardless of the location of principal office or place of business of the corporation.

The venue of suits against corporations organized under the laws of Arkansas is limited by sections 1152 and 1171 of Crawford & Moses' Digest, to counties in which the corporations have an officer or place of business or in which their chief officer resides.

The venue of suits (transitory actions) against individuals is limited by Section 1176, Crawford & Moses' Digest, to the county in which the defendant, or one of several defendants, resides, or is summoned.

These sections, together with other sections of the Constitution and statutes of Arkansas pertinent to a consideration of the case, will be found in an appendix to this brief.

The plaintiff in error, Power Manufacturing Company, is a corporation organized under the laws of the State of Ohio and authorized to do business in the State of Arkansas. The defendant in error, plaintiff below, filed suit against the plaintiff in error, defendant below, in the Circuit Court of Saline County, Arkansas, to recover damages for personal injuries alleged to have been received while he was in the employ of plaintiff in error at Stuttgart, Arkansas (Tr. p. 2). Plaintiff in error, defendant below, filed a motion to dismiss said suit, the material part of which is as follows:

"I.

"The plaintiff at the time of the accident complained of was a resident and citizen of Arkansas County, and still maintains a residence in said county, and all of the matters and things complained of in said complaint occurred in said county.

"The defendant is a corporation organized and existing under the laws of the State of Ohio, and is doing business as a foreign corporation in Arkansas; that its business in Arkansas is located and conducted in Arkansas County, and it does not maintain or conduct an office or business in any other county in this State.

"The plaintiff seeks to maintain this suit against the defendant in this county under and by virtue of the pretended authority of section 1829, Crawford & Moses' Digest of the Statutes of Arkansas.

"That said section is null and void as applied to this defendant, for the following reasons:

"The said section does not apply to corporations of this State, and, under the statutes and laws, corporations of this State cannot be sued except in counties where their principal office is located or in which they do business. That this defendant has no office or place of business nearer to Saline County than Arkansas County, and if plaintiff is allowed to maintain this suit in this county, defendant will be denied a fair and impartial trial, because the defendant witnesses are not within jurisdiction of this court and cannot be required to attend the trial, and defendant will be deprived of the benefit of their presence at the trial, unless it be able to make arrangements for their attendance at court, at great and unnecessary expense.

"That such attempt of said section 1829, Crawford & Moses' Digest, to confer jurisdiction of this case upon this court while such jurisdiction is not conferred in the cases

of corporations of this State doing business in Arkansas and other counties of the State, is a discrimination against the defendant, and in violation of that part of article twelve, section eleven of the Constitution of Arkansas, which provides that foreign corporations as to contracts made or business done in this State shall be subject to the same regulations, limitations, and liabilities as like corporations in this State.

II.

"That by said article twelve, section eleven of the Constitution of Arkansas, the State of Arkansas guaranteed to this defendant, when it entered the State of Arkansas for the purpose of doing business therein, that, as to contracts made, or business done in this State, it should be subject to the same regulations, limitations and liabilities as like corporations of this State. That, relying upon said constitutional guarantee, the defendant entered this State and made large investments for the purpose of carrying on its business, and that attempted enforcement against this defendant of the provisions of section 1829 of Crawford & Moses' Digest, while same are not enforced against like corporations of this State, is an impairment of the obligations of the contract created by the Constitution of Arkansas, and in violation of section ten, article one, and section one of the Fourteenth Amendment of the Constitution of the United States" (Tr. p. 4).

Also an amendment to said motion to dismiss, the material part of which is as follows:

"That the defendant is a foreign corporation, created by and existing under the laws of the State of Ohio; that it has been duly licensed to do business in the State of Arkansas, having fully complied with all the laws of the said State; that it designated in its application for said license and authority to do business in the State, its general office or place of business in the State of Arkansas as

Stuttgart, in the county of Arkansas, State of Arkansas, and named as its agent upon whom process may be served George C. Lewis, and designated his place of residence in Stuttgart, county of Arkansas, in the State of Arkansas; and that the cause of action sued on herein arose in said city of Stuttgart, county of Arkansas; that it does not keep or maintain in the county of Saline a branch office or other place of business; nor is there any property of or debts owing to it in the said county of Saline; nor is it engaged in the business of banking or insurance, nor does its chief officer reside in said county of Saline.

"That, as shown by the summons, it was directed to the sheriff of Arkansas County, State of Arkansas, and his return thereon shows that it was served by said sheriff on the designated agent of the defendant in said county of Arkansas, and that no service was had on this defendant in the said county of Saline.

"And this defendant claims and charges that section 1829 of Crawford & Moses' Digest of Arkansas statutes, authorizing foreign corporations to be sued in any county in the State regardless of the county in which such foreign corporation may be served, while domestic corporations can only be sued in the county where their principal office is, is in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, prohibiting a State from depriving any person within the State of his or its property without due process of law, or denying to any person within its jurisdiction the equal *privilege of the laws*" (Tr. p. 6).

The court overruled the motion to dismiss and the amendment to motion to dismiss, and the trial of the case resulted in a verdict and judgment for defendant in error, plaintiff below. On appeal to the Supreme Court of Arkansas the judgment was affirmed. *Power Manufacturing Company v. Saunders*, 169 Ark. 748.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Arkansas erred in holding and deciding that section 1829 of Crawford & Moses' Digest of the Statutes of Arkansas was valid. The validity of said section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of section 10, article 1, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

2. The Supreme Court of Arkansas erred in holding and deciding that section 1829 of Crawford & Moses' Digest of the Statutes of Arkansas was valid. The validity of said section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of section 1 of the 14th Amendment to the Constitution of the United States, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

3. The Supreme Court of Arkansas erred in holding and deciding that section 1829 of Crawford & Moses' Digest of the Statutes of Arkansas was valid. The validity of said section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of section 1 of the 14th Amendment to the Constitution of the United States which provides that no State shall "deprive any person of life, liberty or property, without due process of law."

4. The Supreme Court of Arkansas erred in affirming the action of the trial court in rendering a judgment against the appellant, Power Manufacturing Company.

ARGUMENT.

THE ARKANSAS STATUTE IS REPUGNANT TO THAT PART OF SECTION 10, ARTICLE 1, OF THE CONSTITUTION OF THE UNITED STATES WHICH PROVIDES THAT NO STATE SHALL PASS ANY LAW IMPAIRING THE OBLIGATION OF CONTRACTS.

The plaintiff in error, Power Manufacturing Company, entered the State of Arkansas under the provisions of article XII, section II, of the Constitution of Arkansas, which provides, as to foreign corporations, that "as to contracts made or business done in this State they shall be subject to the same regulations, limitations and liabilities as like corporations of this State." Notwithstanding this provision of the Constitution, section 1171 and 1152, Crawford & Moses' Digest, provide that actions against a corporation created by the laws of the State must be brought in the county in which it is situated or has its principal office or place of business, or in which its chief officer resides, or in which it has a branch office or place of business, while section 1829, Crawford & Moses' Digest, as construed by the Supreme Court of Arkansas, provides that, as to foreign corporations, suit may be brought in any county of the State, "whether the service was had upon said agent within the county where the suit is brought or is pending or not."

This provision enabled plaintiff in this case (defendant in error) to sue the defendant (plaintiff in error) for a personal injury in Saline County, Arkansas, although the only office or place of business which the defendant had in the State of Arkansas was in Arkansas County, where the accident of which plaintiff complains occurred, and although it had no office or place of business in Saline County. If the defendant had been organized under the laws of

Arkansas the suit would necessarily have been brought in Arkansas County. As a result of these statutes, a corporation organized under the laws of Arkansas and having its place of business in one county is subject to suit in a transitory action in that county only, while a corporation organized under the laws of another State, but authorized to do business in Arkansas under the provisions of the Constitution, and having an office or place of business in but one county, is subject to suit in seventy-five counties.

The discrimination and injustice imposed by the statute is glaringly illustrated in the present case. Plaintiff in error, defendant below, was engaged in the business of selling portable gasoline engines for use in rice fields. Its office and warehouse and the only place of business it had in the State of Arkansas were located at Stuttgart, in Arkansas County. Plaintiff had been in its employ at Stuttgart a number of years.

Plaintiff claimed to have been injured while engaged in loading a piece of machinery from the warehouse into a car. If he had received such an injury while employed by an individual or a domestic corporation in Arkansas County, he would have been required to bring suit in that county, where all of the parties lived, in a court which had jurisdiction of the witnesses and where the case could have been conveniently tried. But, because the defendant was a corporation organized under the laws of another State, plaintiff was allowed to pick any one of seventy-five counties, and did select a county remote from the scene of the alleged accident, where the court did not have jurisdiction of the witnesses and where, for some reason, possibly the influence of his friends or his counsel or political conditions, plaintiff thought his chances for obtaining a large verdict were better than they were in Arkansas County.

Section 4161, Crawford & Moses' Digest, provides that a witness shall not be obliged to attend the trial of a civil

action, except in the county of his residence or an adjoining county. Therefore, the defendant, plaintiff in error here, was required to go to trial without the presence of witnesses, except such as agreed voluntarily to attend. If the suit had been brought in Arkansas County, as would have been required if the defendant had been a domestic corporation, the attendance of witnesses could have been required by subpoena.

It is our contention that section 1829 of the Digest as enforced in this manner imposes different regulations and greater limitations and liabilities upon corporations organized under the laws of other States than are imposed upon corporations organized under the laws of Arkansas.

In the case of *American Smelting Company v. Colorado*, 204 U. S. 103, this court, in passing upon a statute of Colorado which contained provisions similar to those of the Constitution of Arkansas, said (p. 113):

"A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the State at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation upon coming in the State should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporation should be subjected to the same liabilities. In other words, the liabilities, restrictions and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions and duties which might thereafter be imposed upon the

corporation thus admitted to do business in the State. It was not a mere license to come in the State and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the State, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic corporation at the same time and to the same extent."

The Supreme Court of Arkansas in the case of *Pekin Coöperage Company v. Duty*, 140 Ark. 135, brushed aside the doctrine of the above case, on the theory that the case was a tax case, and that (quoting from the opinion, p. 138) "every State, however, has complete control over the remedies which it provides its suitors." We submit that this is not an answer to the proposition. The regulations, limitations and liabilities referred to by the Constitution of Arkansas are not limited to matters of taxation, but are certainly broad enough to cover all matters of substantive right, and the inhibition of the Federal Constitution against the impairment of contracts covers contracts of every character, and is not limited to contracts in matters of taxation.

In the case of *Edwards v. Kearzey*, 96 U. S. 595, this court, after a full discussion of the subject, announced the following rule, p. 607:

"The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void."

In the case of *Louisiana v. New Orleans*, 102 U. S. 203, the court said, p. 206:

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

The latter opinion was quoted and approved in the case of *Hendrickson v. Apperson*, 245 U. S. 105-113.

We think it the height of absurdity to say that the liability to suit in seventy-five counties of a State is not different from and greater than the liability to suit in one county of a State. That the liability is considered of great importance by the litigants, both plaintiffs and defendants, is demonstrated by the fact that the question has been presented to the Supreme Court of Arkansas in a number of cases in comparatively recent years, to-wit: *American Hardwood Lumber Company v. Ellis*, 115 Ark. 524; *Pekin Cooperage Company v. Dady*, 140 Ark. 135; *Missouri State Life Insurance Company v. Witt*, 165 Ark. 604; *Jacks v. Central Coal & Coke Co.*, 156 Ark. 211; and the case now under consideration.

That such a constitutional provision applies to regulations as to the forum in which suits can be instituted or maintained has been decided by a number of courts.

In the case of *Seaboard Air Line Railway Company v. Railroad Commission of Alabama*, 155 Fed. 792, the Circuit Court of Alabama applied a similar provision to a statute prohibiting a foreign corporation from bringing a suit in the Federal court.

In the case of *C. R. I. & P. Ry. Co. v. Ludwig*, 156 Fed. 152, the district judge applied the identical provisions to

a statute of Arkansas prohibiting foreign corporations from instituting suits in or removing suits to the Federal court.

In the case of *C. R. I. & P. Ry. Co. v. Swanger*, 157 Fed. 783, the district judge applied similar provisions to a statute of Missouri prohibiting foreign corporations from removing suits to the Federal court.

In the case of *St. Louis & S. F. Railroad Company v. Cross*, 171 Fed. 480, the district court held to the same effect as to a statute of Oklahoma.

It is worthy of note that all of the district judges before whom the cases were brought held that the statutes violated the contract clause of the Constitution. If this is true where the regulation is of the right to remove to the Federal court, it must be equally true where the regulation subjects a foreign corporation to suits in seventy-five counties as against one county in the case of a domestic corporation.

These anti-removal statutes were subsequently held void by this court on the ground that a State "may not, in imposing conditions upon the privilege of a foreign corporation doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts." *Terral v. Burke Construction Company*, 257 U. S. 529, and cases therein cited. ✓

When the doctrine as announced by this court in *Ex Parte Wisner*, 203 U. S. 449, to the effect that a suit could not be removed to the Federal court on the ground of diverse citizenship unless brought in the district of the residence of either the plaintiff or defendant, was still in force, plaintiffs, in suits against foreign corporations in Arkansas, by taking advantage of section 1829 of the Digest, could bring suits in a district other than that of their residence and prevent the removal of the case by the defendant to the Federal

court. This was done in the case of *Central Coal & Coke Company v. Orwig*, 150 Ark. 635.

A similar situation existed in the case of *Central Coal & Coke Co. v. Ocepek*, 244 S. W. 337. The case came to this court by certiorari and was reversed—261 U. S. 605—upon the authority of *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U. S. 653, and other cases overruling the Wisner case. These cases illustrate the importance attached by plaintiffs in suits against foreign corporations to the regulations, limitations and liabilities imposed by the statute under consideration.

It will probably be contended that plaintiff in error, in entering the State of Arkansas, accepted the construction placed upon the Arkansas statutes by the courts of that State. This is true. But the controlling law of the State is not the statutes but the Constitution. Plaintiff in error claims that the terms of that Constitution became a part of the contract between it and the State, and that the State is now attempting to violate the contract.

The Supreme Court of Arkansas practically admits that if the regulations, limitations and liabilities imposed upon foreign corporations are different from those imposed upon domestic corporations, that would be a violation of the Arkansas Constitution and an impairment of the obligations of the contract, but disposes of the matter by saying, in effect, that the regulations, limitations and liabilities are not different. This raises a question under the Federal Constitution, and when such a question is raised this court will consider the facts to determine if there is a violation of the Constitution, and the decision of the State court on that point is not binding.

Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 683.

⁵ *Kansas City Southern v. Albers Commission Co.*,
223 U. S. 573.

THE ARKANSAS STATUTE DENIES TO PLAINTIFF
IN ERROR AND OTHERS IN LIKE SITUATION
THE EQUAL PROTECTION OF THE LAWS.

In the first paragraph we have shown the discrimination created by the statute as between corporations organized under the laws of Arkansas and those organized under the laws of other States but doing business in Arkansas. For the purpose of this paragraph we call attention to the fact that the same discrimination also exists as between foreign corporations and individuals.

Section 1176, Crawford & Moses' Digest, provides that every other action (in effect, all transitory actions) must be brought in a county in which the defendant, or one of several defendants, resides or is summoned. Therefore, domestic corporations and individuals are on an equal footing and must be sued in the county of their residence or location, or where summoned, while foreign corporations may be sued in seventy-five counties, regardless of location or place of business.

It is no longer open to question that the equal protection clause of the Fourteenth Amendment applies to corporations as well as to persons. In the case of *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150, the court said (p. 154):

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. *Santa Clara County v. Southern Pacific Railroad*, 118 U. S. 394; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 189; *Missouri Pacific Railway v. Mackey*, 127 U. S. 205; *Minneapolis & St. Louis Railway v. Herrick*, 127 U. S. 210; *Minneapolis & St. Louis Railway v. Beckwith*, 129 U. S. 26; *Charlotte & Columbia Railroad v. Gibbs*, 142 U. S. 386; *Covington & Lexington Turnpike*

Company v. Sanford, 164 U. S. 578. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

The question to be considered, therefore, is whether the statute in question is merely a justifiable classification or is a denial of equal protection. On this point the court in the above case laid down the following general principle (p. 155).

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, *Hayes v. Missouri*, 120 U. S. 68; *Railroad Company v. Meckey*, 127 U. S. 205; *Walston v. Nevin*, 128 U. S. 578; *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Giozza v. Tiernan*, 148 U. S. 657; *Columbia Southern Railway v. Wright*, 151 U. S. 470; *Marchant v. Pennsylvania Railroad*, 153 U. S. 380; *St. Louis & San Francisco Railway v. Matthews*, 165 U. S. 1; yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subject to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis

for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Although a number of cases involving the statute have been presented to the Supreme Court of Arkansas and the constitutionality of the statute attacked, the court has not seen fit to give any reason for sustaining the statute as against the equal protection clause of the Constitution, the court having contended itself with holding that the harshness or inconvenience of the statute is a matter addressing itself to the lawmakers (*American Hardwood Company v. Ellis & Company*, 115 Ark. 524); or that it does not take away or impair any right of the defendant (*Pekin Cooperage Company v. Duty*, 140 Ark. 135); or that the question involved was merely one of procedure and that the statute did not impair any constitutional rights (*Power Manufacturing Company v. Saunders*, 169 Ark. 748).

We think the question involved has now been definitely settled by the decisions of this court.

In the case of *Backus v. Fort Street Union Depot Company*, 169 U. S. 557, the question was not directly involved, but the court, in passing on the question there at issue, said (p. 571):

"The question is not presented of a distinct ruling by a State court that one party is entitled to certain rights and the benefits of certain modes of procedure, and that another party similarly situated is not entitled to them. An act of the Legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws."

The recent case of *Kentucky Company v. Paramount Exchange*, 262 U. S. 544, involved a statute similar in principle and the decision, we contend, is conclusive of this case. In that case a statute of Wisconsin provided for an adversary examination of a party or his officer, agent or employee, etc. In the case of a foreign corporation party the statute provided that the court "may also, on motion and such terms as may be just, fix a time and place in this State for such examination of any of said persons." The statute applicable to suitors other than foreign corporations provided that where the party against whom the examination was sought was a resident of the State, the examination could be had only in the county of his residence, and where the party was a nonresident, the examination could be had in the State only if he could be personally served therein.

Compare this with the statutes of Arkansas under discussion. If the defendant is a resident of the State or a domestic corporation, suit can only be brought in the county where service can be had, or the corporation has a place of business, or if the defendant is a nonresident, suit can only be brought in a county where he can be served, but a foreign corporation can be sued in any county of the State selected by the plaintiff, regardless of other considerations.

In Wisconsin an exception was made as to foreign corporations (very much like the exception made by section 1829, *Crawford & Moses' Digest*), whereby examinations within the State might be ordered and compelled against them regardless of their nonresidence and of any inability to obtain service on them in the State.

The Supreme Court of Wisconsin undertook to justify this difference in legislative treatment and the order for examination on the ground "that they amounted to no more than a reasonable exercise of the authority of the State over a nonresident corporation coming voluntarily into the State to seek a remedy in her courts against a resi-

dent defendant." In other words, the court seemed to follow the doctrine of the Supreme Court of Arkansas, that the statutes merely affect a method of procedure, and that differences in methods of procedure are not in contravention of the Constitution. This court took a different view, and in passing on the question said:

"That the plaintiff owed its corporate existence to Kentucky did not enable Wisconsin to treat its plight with indifference. It was a 'person' within the meaning of both the due process clause and the equal protection clause of the Fourteenth Amendment. *Santa Clara County v. Southern Pacific R. R. Co.*, 118 U. S. 394, 396; *Covington & Lexington Turnpike Co. v. Sandford*, 164 U. S. 578, 592; *Smyth v. Ames*, 169 U. S. 466, 522; *Atchinson, Topeka & Santa Fe Ry. Co. v. Vosburg*, 238 U. S. 56. The latter clause declares that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' meaning, of course, the protection of laws applying equally to all in the same situation. The words 'within its jurisdiction' are comprehensive, but we have no need for attempting a full definition of them here. It is easy enough to say that, when the plaintiff went into Wisconsin, as it did, for the obviously lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that State, it was, in our opinion, within her jurisdiction for all the purposes of that undertaking. See *Southern Ry. Co. v. Greene*, 216 U. S. 400; *Blake v. McClung*, 172 U. S. 239. And we think there is no tenable ground for regarding it as any less entitled to the equal protection of the laws in that State than an individual would have been in the same circumstances; for, as was held in *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, 154, a State has no more power

to deny to corporations the equal protection of the law than it has to individual citizens.

"No doubt a corporation of one State seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553, 561); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin—a requirement which, under the statute, could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit.

"We hold that the statute as it was applied in this case was invalid, and the orders made under it were erroneous, as denying to the plaintiff the equal protection of the laws."

By analogy, there could be no reason for permitting a corporate resident of Ohio, with its principal place of business in Arkansas County, to be sued in any other county of the State, that would not apply to a domestic corpora-

tion, or an individual resident of Arkansas County, in a like case.

The only other State of which we have knowledge, in which the exact question has arisen, is the State of Missouri. There the statutes provide that suits for libel against corporations shall be brought in the county in which the defendant is located or in the county in which the plaintiff resides. The statute covering the question of venue in libel and other suits against individuals provides that suits may be brought in the county where the defendant resides or where the plaintiff resides and the defendant may be found.

When the statutes were first before the Supreme Court of Missouri the court, by a divided opinion, sustained their validity. Subsequently, however, the court gave the question further consideration, and in the case of *McClung v. Pulitzer Publishing Company*, 279 Mo. 370, 214 S. W. 193, overruled former opinions and squarely held that the statutes violated the equal protection clause of the Federal Constitution. The court used the following language (214 S. W., p. 196):

"So, then, we conclude that since the decision in *Houston v. Pulitzer Publishing Co.*, 249 Mo. 332, 155 S. W. 1068, decided April 8, 1913, this court has been of the opinion that the Legislature has not the authority under the State and Federal Constitutions to provide that the venue in libel suits shall be that the individual charged with libel may only be sued in the county where he resides, or where the plaintiff resides if the individual is there found, but that in the case of a corporation charged with libel the corporate defendant may be sued in a county in this State where neither the action accrued nor the corporation has its domicile or agent for the transaction of business, and that the Legislature may not provide that a citizen of the State, who is plaintiff in a libel suit, can sue a

corporate defendant charged with libel in the county where the citizen resides, while a citizen, as plaintiff, who charges an individual defendant with committing a libel, cannot sue the defendant in the county in which the plaintiff resides, unless the individual defendant shall be found in the county where the plaintiff resides." * * * "The Legislature of the State has the power to make reasonable classification of people and of corporations in determining the venue of actions, but it has not the power to make an arbitrary or unreasonable classification. The statute in question is not a venue statute, governing the venue of all libel suits. It is a statute governing the venue of libel suits against corporations. It is not even a statute governing venue of libel suits against newspaper corporations. No good reason has been given why corporate libelers are any different from individual libelers. No reason has been given why a corporate defendant publishing a daily newspaper in the city of St. Louis with a large circulation should be subject to suit in Cole County, while an individual who publishes a paper with a large circulation in Kansas City is not subject to suit in Cole County. We believe none can be given. We believe the classification of individuals and corporations unreasonable, and not based upon 'any difference which bears a just and proper relation to the attempted classification.' No doubt more could be said for the reasonableness of a statute which provided that in all libel suits against individuals and corporations alike the action might be brought in the county where the plaintiff resides if there is publication of the libel in that county. But such is not the statute under consideration. (pp. 198, 199)." * * *

"Would not the court without a moment's hesitation declare unconditional a statute which provided

construction only of statutes is concerned, but they are matters for the court to consider when the question involved is one of violation of the Federal Constitution. The harshness and inconvenience recognized by the Supreme Court of Arkansas in the above decision and which is imposed on foreign corporations and not on domestic corporations or individuals is a denial of the equal protection of the laws such as the Constitution was designed to prohibit.

The Supreme Court of Arkansas lays much stress upon the fact that the statutes of Arkansas, as it has construed them, do not confer a local or county residence upon foreign corporations (*American Hardwood Lumber Company v. Ellis Company*, 115 Ark. 524; *Pekin Cooperage Company v. Duty*, 140 Ark. 135).

Section 1826, Crawford & Moses' Digest, authorizing foreign corporations to do business in the State, provides that a foreign corporation "shall also designate its general office or place of business in this State." The motion to dismiss in this case, the facts of which must be accepted as true, states that the plaintiff in error had designated its general office or place of business in the State of Arkansas as Stuttgart, Arkansas County; that its business in Arkansas is located and conducted in Arkansas County, and it does not maintain or conduct an office or business in any other county in the State.

It is conceded that, under similar circumstances, a local or county residence in Arkansas County would be conferred upon a domestic corporation. We think it clear that the Supreme Court of the State erred in holding that section 1826 did not confer such a local or county residence, but assuming, as we must, that it was correct in so holding, then the refusal to confer a local or county residence upon the plaintiff in error under the circumstances, while conferring such a local or county residence upon domestic corporations, is as much a discrimination against the plaintiff

in error and is as much an imposition of different regulations, limitations and liabilities upon it from those imposed upon domestic corporations, and is as much a denial of the equal protection of the laws, as if such a local or county residence had been conferred and the Legislature or court had made the same discriminations in statutes affecting venue. In other words, the discrimination exists, and it is immaterial whether it was brought about by failure to confer a local or county residence, or otherwise.

It will no doubt be contended that plaintiff in error is estopped in this case from attacking the constitutionality of the Arkansas statute, either on the ground that it impairs the obligations of a contract or that it denies to it the equal protection of the laws, on the theory that when it entered the State it did so with knowledge of the statutes as construed by the courts of the State and accepted the conditions imposed, one of which, it will, of course, be contended, was that it could be sued on a transitory action in any county in the State. Whatever the law on this question may have been in former times, it has now been definitely settled by this court that a State may not impose unconstitutional conditions upon a corporation as a condition precedent to entering the State. The State may grant or refuse permission to enter, or it may grant permission upon conditions which do not contravene the Constitution, but it cannot impose a condition the object and effect of which is to nullify the Constitution of the United States. In other words, a condition imposed by the State or an agreement made by the entering corporation that said corporation will waive or agree to a nullification of the equal protection clause of the Constitution is void.

This doctrine was definitely announced in the case of *Terral v. Burke Construction Co.*, 257 U. S. 529, and cases therein cited, but the question has been more recently considered and discussed at length by this court in the case of

Frost & Frost Trucking Company v. Railroad Commission of the State of California opinion delivered June 7, 1926, 271, U. S. 583, where the conclusion reached by the court is stated as follows:

"It would be a palpable incongruity to strike down an act of State legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the State threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

This principle was approved and followed in the recent case of *Hanover Fire Insurance Company v. Carr*, decided November 23rd, 1926, 71 U. S. Supreme Court Law Ed. 224.

Respectfully submitted,

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Little Rock, Ark., Dec., 1926.

APPENDIX.

The sections of the Constitution and statutes of Arkansas pertinent to a consideration of this case are as follows:

Article XII, section II, of the Constitution, which is as follows:

"Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this State except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State, nor shall they have power to condemn or appropriate private property."

The following sections of Crawford & Moses' Digest of the Statutes of Arkansas:

"1152. On Corporate Agent at Branch Office. Any and all foreign and domestic corporations who keep or maintain in any of the counties of this State a branch office or other place of business shall be subject to suits in any of the courts in any of said counties where said corporations so keeps or maintains such office or place of business, and service of summons or other process of law from any of the said courts held in said counties upon the agent, servant or employee in charge of said office or place of business shall be deemed good and sufficient service upon said corporations and shall be sufficient to give jurisdiction to any of the courts of this State held in the counties where said

service of summons or other process of law is had upon said agent, servant or employee of said corporations.

"1171. Against Corporations. An action, other than those in sections 1164, 1165, against a corporation created by the laws of this State may be brought in the county in which it is situated or has its principal office or place of business, or in which its chief officer resides; but if such corporation is a bank or insurance company, the action may be brought in the county in which there is a branch of the bank or agency of the company, where it arises out of a transaction of such branch or agency.

"1176. Other Actions. Every other action may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned.

"1826. Authority to Do Business. Every company or corporation incorporated under the laws of any other State, Territory or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this State, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served.

"1827. Filing Resolution of Board of Directors. Before authority is granted to any foreign corporation to do business in this State, it must file with the Secretary of State a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Secretary of State of this State, in any action brought or pending in this State, shall

be a valid service upon said company; and if process is served upon the Secretary of State it shall be his duty to at once send it by mail, addressed to the company at its principal office.

"1828. Rights and Liabilities—Exemptions. Such corporation shall be entitled to all the rights and privileges and subject to all the penalties conferred and imposed by the laws of this State upon similar corporations formed and existing under the laws of this State; provided, that the provisions of this act requiring copy of original articles of incorporation or charter, and certificate naming an agent, and to pay certain fees therefor, shall not apply to railroad companies which have heretofore built a line of railroad into or through this State; provided, further, that the provisions of this act are not intended and shall not apply to 'drummers' or traveling salesmen soliciting business in this State for foreign corporations which are entirely non-residents.

"Section 1829. Service of Summons. Service of summons and other process upon the agent designated under the provisions of section 1826 at any place in this State shall be sufficient service to give jurisdiction over such corporation to any of the courts of this State, whether the service was had upon said agent within the county where the suit is brought or is pending or not.

"Section 4161. *"Witnesses not compelled to attend where.* A witness shall not be obliged to attend for examination on the trial of a civil action, except in the county of his residence or in adjoining county, nor to attend to give his deposition out of the county where he resides, or where he may be when the subpoena is served on him, requiring his attendance within three days. Civil Code, Sec. 586."